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Supreme Court, U.S.
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No. 92-250

In The
Supreme Court of the United States
October Term, 1992

JASON GRAY
Petitioner

v.

STATE OF CONNECTICUT
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The petition is not brought seeking certiorari merely to seek review of the evidence presented below nor to discuss specific facts, but instead presents issues of due process of law not properly ruled upon by a divided court below.

Respondents reliance upon *United States v. Johnston*, 286 U.S. 307 (1925) is misplaced. The petition in *Johnston* did not seek certiorari merely to seek review of evidence. This petition does not seek certiorari to merely seek review of evidence. In *Johnston,* the judgment of the Circuit Court of appeals was reversed because the Court of Appeals applied erroneous law to the facts presented to the jury. The theory of the laws to be applied were of "grave importance" to the administration of the revenue laws. In this petition, it is Gray's claim that the interpretations of the Fifth and Fourteenth amendments with respect to evidence offered below are matters of grave importance to the preservation of individual rights which were intended to be protected by the adoption of these amendments to our constitution. Criminal proceedings based upon facts that give rise to mere suppositions, conjectures and speculations cannot be condoned under our system of government. The Federal Rules of Evidence, section 104(b) was adopted because proofs of conditionally relevant evidence without proof of the condition would create circumstances in which a jury would be invited to indulge in conjecture and speculation. *United States v. Johnston* is not a road map to the means by which convictions may be obtained in a State Court and fully insulated from review by Petition for Certiorari for violations of federally protected constitutional rights. The petition of Gray alleges repetitive use of conditionally relevant evidence, repetitively without proof of condition, in manner violating his constitutional rights and a conviction based upon a record totally devoid of support in the evidence.

The statement of Justice Holmes was made to alert the bar of this Court that insignificant issues do not merit granting

certiorari. The purpose of certiorari is to promote wise adjudication of cases " 'involving principles the settlement of which is of importance to the public as distinguished from that of the parties', *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393" [Frankfurter, J., dissenting. *Sentilles v. Inter-Carribbean Corp.* 361 U.S. at 112.] When the evidence establishes as a matter of law the insufficiency of evidence with conviction of a defendant in violation of constitutional due process rights, this court has not hesitated to conduct a searching inquiry into evidence and evidential matters. e.g.: *Sherman v. United States*, 356 U.S. 369, 373, 78 S. Ct. 819, 2 L ed. 2d 848, 851. *Thompson v. City of Louisville*, 362 U.S. 654, *Hawkins v. United States*, 358 U.S. 74, 79-80, 79 S Ct 136, 3 L ed. 2d 125, 129.

Respondent's counter-statement of facts does not set forth factual assertions that the record below contained sufficient evidence to convict the petitioner.

The petition set forth the claims of the state in the record below which were entirely based upon conditionally relevant proofs and identified the conditions not proven. The counter-statement of facts does not respond to the conditions not proven.

Respondent's counter-statement of facts terminates with a conclusory assertion that "The tests revealed that the chemical constituents in the xylenes from the debris and the Siloo were almost a perfect match" [page 5]. Appended hereto is photograph of the Siloo can and the can marked at trial as Exhibit T, both containers photographed on the day of the verdict, with the permission of the trial judge, for the purpose of preserving the appearance of the said containers during trial, said photographs later marked as exhibits during the July 29, 1990 post verdict proceedings. Given the fact that the Connecticut Supreme Court found that the Siloo can was not leaking during trial, that the test referred to above occurred between April 24 and April 26, 1990, and that the cans had been in the custody of the fire marshal from September 1989 until April 24, 1990, the "high tide" line from

the evaporation of fluid observed on the Siloo can's top does not justify a conclusion that the can was not leaking fluid at the relevant period of time prior to testing. Similarly, the evident holes in the can labeled Exhibit T do not support the inference that evaporating or leaking fluids could not have entered Exhibit T on any theory that the can was proven to be an impervious container. A "perfect match" was reasonably expected because care was not taken to prevent transfer of molecules between the two photographed cans during storage, to wit: contamination. Respondent's brief is devoid of statements intended to refute Petitioner's claim that no evidence was presented as to the care taken during the fire marshal's custody of the two containers to prevent the obvious source of contamination.

Respondent claims [page 5, top] that there was "no material in contact with or lying on the floor directly below the fixture". The statement is made in response to petitioner's claim that the record justified the conclusion that sloppy storage of packaged goods permitted contact with naked incandescent light-bulbs, an acknowledged fire hazard. There was no proof that there **ought to have or would have been** any identifiable residue material in contact with the porcelain light socket after the fire was brought under control, given the intensity of the burnout in this area and the fact that the light bulb, its metal base, and its metal socket disappeared in the fire and heat. Photographs in evidence showed entire areas of the shelves totally burned away. Photographs showed a foot deep layer of unidentifiable debris from unidentified areas of the shelving which the fire marshal caused to be shoveled out to a dumpster within hours.

At page 5, the Respondent's brief recites claims that the pattern of the burn mark on the floor, charring at the base of shelves, a wall pattern that did not follow a straight line, and absence of glaze on window panes were considered "**consistent** with ignition by a flammable accelerant". There was no proof that the foregoing facts were in any way **inconsistent** with the indigenous conditions found at the scene, nor inconsistent with accidental fire. The fire was unusual in that

a concrete roof prevented a burn-through with natural ventilation upward and out. The breaking of selected windows in sequences described affected the heat levels. The fire marshal's photographs showed windows were broken before the development of the intense flames immediately in the vicinity of the first broken window at which the burn pattern area is found. We observe that the existence of fire itself is **consistent** with arson. The existence of fire itself, however, is not **inconsistent** with accident. Proof of a fact "consistent with arson" is conditionally relevant. The condition required is that there ought to be proof that the fact consistent with arson is also inconsistent with a non-arson fire in the light of other facts existing and inconsistent with the innocence of the defendant. A test not unreasonable in the light of the Due Process clause of the constitution. Ignition of a paper package caused by contact with a light bulb would not have not produced large quantities of soot capable of a formation of a heavy glaze of soot on panes of glass. The paper would not reasonably be expected to survive the fire in identifiable form. The claimed proofs are specious and insufficient and invite speculation with the approbation of the court.

The presentation of evidence to the jury that petitioner said "they think I did it", without more, placed unconstitutional burden upon the plaintiff, switching the burden of proof with respect to the alleged incriminating nature thereof.

At page 9 the Respondent speaks of the "strength of the state's evidence" and a claim that strong evidence does not impose an unconstitutional burden upon a criminally accused defendant. However, it is not the strength of the prosecution's evidence, but instead, the utter weakness of the State's case, wholly devoid of proof, that is complained of as having imposed upon defendant an unconstitutional burden by which the State of Connecticut was relieved of the burden of proving that no contacts had been made with the defendant and therefor the inference could be drawn that the defendant was fishing for information. By rejecting the defendant's request

to charge, the instructions to the jury, *sub-silencio*, endorsed the prosecution's claim that the defendant's unexplained statement gave rise to the inference which the state claimed at trial. The court was barred by *Yates v. Aiken*, 484 U.S. 211, 217, 108 S Ct. 534, 98 L.ed 2d 546, 554 from telling the jury directly that the State was relieved of its burden of proof. The claim that defendant made a statement "out of a consciousness of guilt" is mere accusation, not evidence. The accusation was left to the jury as sufficient, as if it were proof, and material for their consideration. In these circumstances, there is inferred burden imposed upon the Petitioner to respond, explain, and prove the circumstances causing the statement was not as asserted by the Respondent, and this is in violation of the Constitution of the United States as claimed in the petition. Compare: *United States v. Hale* 422 U.S. 171,180-181, 95 S Ct 2133, 45 L Ed 99, 107: a defendant has no burden to explain his silence against an accusation that his silence was a manifestation of guilt.

The issues raised are not determined by a liberal or conservative view point as to the scope of the Constitution. If the facts herein presented were offered in proof of a civil action for damages seeking recovery from a defendant insured for negligence, the action would be dismissed as frivolous. The proofs of conditionally relevant facts without proof of the relevant supporting conditions would not be allowed against a claim that property was taken without due process of law.

Respectfully submitted
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APPENDIX WITH REPLY

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